NO. 48079-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ADAM DIAZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Doorninck

No. 15-1-01288-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence to support the convictions for criminal trespass in the first degree, where, *inter alia*, multiple witnesses testified to seeing the defendant enter residents' rooms without permission, he was found with the personal property of a resident, and he was untruthful to officers when detained?

2. Assuming, *arguendo*, the defendant's appeal is unsuccessful, should the Court impose appellate costs, where the defendant has failed to establish a manifest hardship as required by RCW 10.73.160?

B. STATEMENT OF THE CASE.

1. Procedure

On April 1, 2015, the defendant was charged via information with one count of possession of stolen property in the first degree, three counts of criminal trespass in the first degree, and one count of driving while license suspended/revoked in the third degree. CP 1-3. On July 23, 2015, an amended information was filed, charging the defendant with the original charges, plus an additional charge of driving without required ignition interlock device. CP 8-12.

Trial commenced and opening statements were delivered on July 27, 2015. III RP 52-53. Closing arguments were given on August 3, 2015. V RP 227 *et seq.* The jury returned its verdict on August 4, 2015. The jury hung as to the count of possessing stolen property in the first degree;

acquitted the defendant of one of the counts of criminal trespass in the first degree; and convicted the defendant of the remaining counts, to wit: two counts of criminal trespass in the first degree, one count of driving while license suspended/revoked in the third degree, and one count of driving without required ignition interlock device. CP 55-60; VI RP 278-79.

2. Facts

The defendant's grandmother, Jenny Black, lived at the Weatherly Inn, a senior residence community in Tacoma, Washington. V RP 200. She lived in room 314. IV RP 72. On March 31, 2015, the defendant went to Weatherly Inn, but didn't sign in as required by the Weatherly Inn. IV RP 115, 117. Annie Kimani, a caregiver to the resident in room 353, observed a man matching the description of the defendant enter room 353 and remain for several minutes, ignoring her when she called out, "Hello?" IV RP 87-88, 90-91. Dennis Gunnarson, the son-in-law to the residents in room 309, observed a man matching the defendant's description enter room 309 and look toward the bedroom, before Mr. Gunnarson asked, "May I help you?" and the man replied he was looking for his grandmother and left. IV RP 99-100. Tacoma Police Officer Kevin Lorberau took a total of five reports regarding entry into units that day by an unwanted person matching the defendant's description. IV RP 129-32.

The defendant was detained in the parking lot by Officer Albert Schultz. IV RP 71. The defendant stated he was looking for his grandmother's room. IV RP 71. He denied entering any rooms other than

his grandmother's. IV RP 72. A search incident to arrest revealed a women's Rolex watch in the defendant's front pants pocket. IV RP 76-77. The watch was later identified as belonging to Gloria Goodman, the resident in room 376. IV RP 167, 169. The defendant claimed he had bought it from a pawn shop at 96th and South Tacoma Way. IV RP 135. Detectives checked and there were no pawnshops in the area of 96th and South Tacoma Way. V RP 210.

C. ARGUMENT.

1. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS FOR CRIMINAL TRESPASS IN THE FIRST DEGREE, BECAUSE, *INTER ALIA*, MULTIPLE WITNESSES TESTIFIED TO SEEING THE DEFENDANT ENTER RESIDENTS' ROOMS WITHOUT PERMISSION, HE WAS FOUND WITH THE PERSONAL PROPERTY OF A RESIDENT, AND HE WAS UNTRUTHFUL TO OFFICERS WHEN DETAINED.

The evidence presented at trial was sufficient to support the jury's verdict of guilty to the charge of criminal trespass in the first degree for entering rooms 353 and 309, because, *inter alia*, multiple witnesses testified to seeing the defendant enter residents' rooms without permission, he was found with the personal property of a resident, and he was untruthful to officers when detained.

"A sufficiency challenge admits the truth of the State's evidence and accepts the reasonable inferences to be made from it." ***State v.***

Federov, 181 Wn. App. 187, 193-94, 324 P.3d 784 (2014) (quoting ***State v. O'Neal***, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007)). "The standard of review for a challenge to the sufficiency of the evidence" is whether, viewing the evidence "in a light most favorable to the State, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" ***State v. Sweany***, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) (quoting ***State v. Randhawa***, 133 Wn.2d 67, 73, 941 P.2d 661 (1997) (citation omitted) (internal quotation marks omitted) (quoting ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980))); *see also, e.g.*, ***State v. Rich***, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Stated another way, a conviction will be reversed "only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt." ***Federov***, 181 Wn. App. at 194 (quoting ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005)).

"A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building." **RCW 9A.52.070**. The jury was properly instructed of this definition. CP 39. In addition, the court properly instructed the jury:

> A person remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.
> A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

CP 40. The jury was further properly instructed, "each unit of a building of two or more units separately secured or occupied is a separate building." CP 42.

Here, viewing the evidence in the light most favorable to the state, there was sufficient evidence to convict the defendant of criminal trespass in the first degree in counts III (room 353) and IV (room 309) of the amended information. CP 8-12.

The evidence at trial included the following: The defendant's grandmother, Jenny Black, lived at the Weatherly Inn, a senior residence community. V RP 200. She lived in room 314. IV RP 72. On March 31, 2015, the defendant went to Weatherly Inn, but didn't sign in as required. IV RP 115, 117. Annie Kimani, a caregiver to the resident in room 353, observed a man matching the description of the defendant enter room 353 and remain for several minutes, ignoring her when she called out, "Hello?" IV RP 87-88, 90-91. Dennis Gunnarson, the son-in-law to the residents in room 309, observed a man matching the defendant's description enter room 309 and look toward the bedroom, before Mr. Gunnarson asked, "May I help you?" and the man replied he was looking for his grandmother and left. IV RP 99-100. Tacoma Police Officer Kevin Lorberau took a total of five reports regarding entry into units that day by an unwanted person matching the defendant's description. IV RP 129-32.

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Viewing this evidence in the light most favorable to the state, there was sufficient evidence to conclude that the defendant trespassed in rooms 353 and 309 of the Weatherly Inn on the date in question.

2. ASSUMING, *ARGUENDO*, THE DEFENDANT'S APPEAL IS UNSUCCESSFUL, THE COURT SHOULD IMPOSE APPELLATE COSTS, BECAUSE THE DEFENDANT HAS FAILED TO ESTABLISH A MANIFEST HARDSHIP AS REQUIRED BY RCW 10.73.160.

Assuming, *arguendo*, the defendant's appeal is unsuccessful, the Court should impose appellate costs, because the defendant has failed to establish a manifest hardship as required by RCW 10.73.160.

An appellate court may provide for the recoupment of appellate costs from a convicted defendant. RCW 10.73.160; ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing

party is within the discretion of the appellate court. ***State v. Sinclair***,-Wn. App.-, *2-3, (2016)(2016 WL 393719); *see, also* RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000).

The Supreme Court has recently clarified that the imposition of legal financial obligations (LFOs) by a trial court requires "each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances." ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015). However, ***Blazina*** addressed the trial court LFO statute, RCW 10.01.160, not the appellate costs statute, RCW 10.73.160.

Under ***Blazina***, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as ***Sinclair*** points out at *5, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Here, the defendant has failed to establish any such "manifest hardship." Accordingly, this Court should impose appellate costs, assuming, *arguendo*, the defendant's appeal is unsuccessful.

D. CONCLUSION.

The evidence presented at trial was sufficient to support the jury's verdicts of guilty to the charges of criminal trespass in the first degree. Further, assuming, *arguendo*, the defendant's appeal is unsuccessful, the Court should impose appellate costs.

DATED: May 2, 2016.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.2.16
Date Signature

PIERCE COUNTY PROSECUTOR

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